

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**DENNIS J. ARBAUGH**

Claimant

V.

**OLD DOMINION FREIGHT LINE, INC.**

Respondent

AND

**NEW HAMPSHIRE INSURANCE CO.**

Insurance Carrier

Docket No. 1,062,204

**ORDER**

Respondent and its insurance carrier (respondent) requested review of the July 21, 2015, Award by Administrative Law Judge (ALJ) Gary K. Jones. This is a post award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

**APPEARANCES**

Phillip B. Slape of Wichita, Kansas, appeared for claimant. Kip A. Kubin of Leawood, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the post award record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found it more probably true than not that claimant's original injury is the prevailing factor in the need for additional medical treatment, and such treatment is necessary to cure and relieve the effects of claimant's original injury. The ALJ granted claimant's request for medical treatment and authorized Dr. Pat Do to provide treatment for claimant's neck and right shoulder.

Respondent argues the ALJ erred in granting medical treatment because claimant failed to prove the elements necessary to establish an award for future medical care.

Respondent contends there is no evidence indicating claimant has a current need for treatment, that there is a causal connection between the accident and treatment, or that the accident is the prevailing factor in the need for additional medical care.

Claimant maintains the ALJ's Order should be affirmed. Claimant argues the ALJ was correct in stating K.S.A. 44-510k(a)(2) does not specifically require claimant to present current medical evidence demonstrating his need for medical treatment. Additionally, claimant's counsel requests post award attorney fees.

The issues for the Board's review are:

1. Did the ALJ err in granting claimant additional medical treatment?
2. Is claimant's counsel entitled to post award attorney fees?

#### **FINDINGS OF FACT**

Claimant currently works for respondent as a line haul driver, hauling two semi tractor trailers between Parsons and Wichita, Kansas. Claimant has worked for respondent for approximately three years. On June 15, 2012, claimant sustained an accident while working for respondent and injured his right shoulder and neck. Claimant underwent conservative treatment and eventually an independent medical evaluation (IME) by court-ordered physician Dr. Pat Do.

In his IME dated June 10, 2013, Dr. Do reviewed claimant's history, medical records and performed a physical examination. Dr. Do diagnosed claimant with myofascial neck pain and right shoulder pain. He noted claimant had some impingement, possible rotator cuff pathology, and a positive Kibler that could represent labral pathology. Dr. Do opined claimant sustained a 9 percent whole person impairment as a result of the accident and indicated no permanent restrictions were necessary. On October 1, 2013, Dr. Do submitted an opinion regarding the need for future medical treatment:

I reviewed my independent medical examination done on June 10, 2013, and my suggestion would be to offer him intermittent trigger point injections, anti-inflammatory medication, and ultimately if that shoulder ever hurts him bad enough to warrant it he is a candidate for a right shoulder arthroscopic subacromial decompression and possible repair of what might be a labral injury.<sup>1</sup>

This claim was settled before a Special Administrative Law Judge on November 12, 2013, with a running award reflecting a 9 percent permanent partial general body disability. A Stipulation for Agreed Award attached to the settlement hearing transcript states, in part:

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<sup>1</sup> P.A.M. Trans., Cl. Ex. 2 at 1.

That the court finds that it is more probably true than not true the claimant may need additional medical treatment and that the claimant is entitled to receive future medical treatment at the expense and direction of the respondent and insurance carrier upon proper application to the Director of Workers Compensation pursuant to K.S.A. 44-510k or by agreement of the parties;<sup>2</sup>

Claimant has not sought medical care related to his right shoulder and neck complaints since last seeing Dr. Do in June 2013. Claimant takes over-the-counter ibuprofen for his pain approximately once per week. Claimant testified he continues to have constant pain in his right shoulder and neck which has not improved since he was designated at having reached maximum medical improvement by Dr. Lucas.<sup>3</sup> He remains employed with respondent and participates in activities such as motorcycling, carpentry work, and general household maintenance. Claimant testified carpentry work irritates his condition and yard work is uncomfortable, "but it needs to be done."<sup>4</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510k(a) states, in part:

(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the

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<sup>2</sup> S.H. Trans. at 19.

<sup>3</sup> P.A.M. Trans., Cl. Ex. 1 at 1. Dr. Lucas' release is noted by Dr. Do.

<sup>4</sup> P.A.M. Trans. at 26.

administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

. . .

(4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

K.S.A. 2011 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-536(h) states:

Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal. Accordingly, the findings and conclusions set forth reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**ANALYSIS****1. Did the ALJ err in granting claimant additional medical treatment?**

Respondent argues that the lack of a more recent medical opinion from Dr. Do regarding the prevailing factor causing claimant's need for medical treatment causes claimant to fail in meeting the burden of proving his current need for medical treatment is related to the June 15, 2012, work-related accident. The Board disagrees.

Dr. Do's recommendations for medical treatment were very specific regarding the ongoing nature of claimant's need for medical treatment related to his injury. It is evident Dr. Do believed claimant would require intermittent trigger point injections and was a candidate for shoulder surgery. The Board agrees with the ALJ's finding that the prevailing factor for claimant's current need for medical treatment is the June 15, 2012, work-related accident.

**2. Is claimant's counsel entitled to post award attorney fees?**

Claimant's request for post award attorney fees should be submitted to the ALJ in accordance with K.S.A. 2011 Supp. 44-536(g).<sup>5</sup>

**CONCLUSION**

Claimant has met the burden of proving his June 15, 2012, work-related accident is the prevailing factor for his current need for medical treatment.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Gary K. Jones dated July 21, 2015, is affirmed.

**IT IS SO ORDERED.**

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<sup>5</sup> See *Clover v. YRC Incorporated*, No. 1,039,449, 2014 WL 1340585 (Kan. WCAB Mar. 10, 2014); *Webb v. Hi-Lo Industries*, No. 247,536, 2014 WL 2616679 (Kan. WCAB May 6, 2014).

Dated this \_\_\_\_\_ day of September, 2015.

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BOARD MEMBER

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BOARD MEMBER

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Gary K. Jones, Administrative Law Judge